

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

74-1550

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page 5

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

CARMINE TRAMUNTI, JOSEPH DiNAPOLI, et al.,

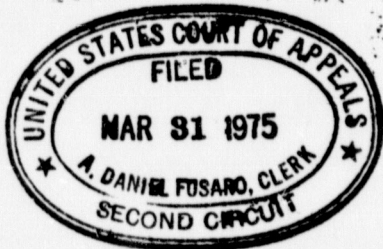
Appellants.

**PETITION FOR REHEARING EN BANC
PURSUANT TO RULES 35 AND 40, RULES OF
APPELLATE PROCEDURE IN BEHALF OF
APPELLANT, JOSEPH DiNAPOLI**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-1550

- - - - - x
THE UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAMUNTI, JOSEPH DINAPOLI,
Et Al.,

Appellant.

- - - - - x
PETITION FOR REHEARING EN BANC, PURSUANT TO RULES
35 AND 40, RULES OF APPELLATE PROCEDURE IN BEHALF
OF APPELLANT JOSEPH DINAPOLI.

TO THE HONORABLE COURT:

On March 7th, 1975, this Court unanimously affirmed the conviction of appellant Joseph DiNapoli* (Waterman, Oakes and Guernsey, Circuit Judges) from the Judgment of the United States District Court of the Southern District of New York (Duffy, D.J.). Cf. United States v. Tramunti, 377 F.Supp. 1 (S.D.N.Y. 1974).

POINT I

THE ARREST, SEARCH AND SEIZURE

In its reluctance to "lean over backward to blaze new pathways of individual responsibility in hard drugs cases" (0.2140,n.26)** a distinguished panel of this Court has blown a huge hole in the Fourth Amendment. If this decision becomes law, police can virtually arrest and search at will any citizen who lives in a questionable neighborhood or is seen in the company of a criminal suspect. No decision cited by the Court or the Government, and none found by appellant, remotely tends to authorize the arrest and search in this case. It is the latest low-water mark of Fourth Amendment law.

If the decision did nothing more than misapply established principles to facts, it would warrant rehearing, for the facts are

* Judgment also affirmed as to Ceriale, Christiano, D'Amico, Gamba, Inglese, Mamone, Pugliese, Robinson, Russo, Springer, Tramunti and Ware. Judgment was reversed as to Alonzo and reversed and remanded as to Salley.

** The Court's opinion will be cited by its pagination preceded by the letter "O" in parentheses; thusly, "(0.--)". Other citations are to the record.

not unique. The essential circumstances preceding the arrest are those facing police officers everyday -- persons carrying packages into and out of their homes -- innocent behavior which every citizen was heretofore entitled to engage in without being arrested. But the decision does far more damage than that; it explicitly gives an unprecedented meaning to "probable cause" which robs that concept, and the Fourth Amendment, of its capacity to protect a citizen's privacy and reduces its time-worn prophylactic restraints to a hollow formula.

The Court held that DiNapoli was subject to arrest and search because he arrived and left his home in the company of a suspected narcotics trafficker, carrying a suitcase that appeared lighter when he entered his home than when he left it. This (together with the fact that an attorney's car left the premises while DiNapoli and Papa were in the house) gave the officers "sufficient reason to believe that a narcotics transaction was probably taking place" (emph. supp.) (0.2132), and that there were narcotics in the suitcase. Even if this were true, it would not satisfy the Fourth Amendment. Henry v. United States, 361 U.S. 98 (1959) holds that "[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed" (emph. supp.) (Id. at 102). Neither "strong reason to suspect," nor "good faith" (Id. at 101-2) will suffice.

It is not enough to have reason to believe an offense is probably taking place; the officers must have a belief that an offense is taking place; and this belief must be based upon "facts and circumstances within (the arresting officers') knowledge...sufficient in themselves to warrant a man of reasonable caution in (that) belief." Carroll v. United States, 267 U.S. 132, 162 (1925); Draper v. United States, 358 U.S. 307, 313 (1958) . Officer Pallatroni had no such belief and plainly could have had none. The Court's opinion thus elevates suspicion into "probable cause" and deprives the Fourth Amendment of its essential meaning.

The pernicious implications of the decision, moreover, do not end with its redefinition of probable cause, for it equips the hypothetical reasonable man, who heretofore set the standards of probable cause, with police paranoia, and impliedly accepts police contrivance.

The Court takes two pages (0.2128-2129) to dispose of the fact that what Pallatroni said he "attached quite a bit of significance to" (S.103) was insignificant, namely, Papa's use of a rented car. When it was conclusively established in the hearing before Judge Brieant that the car was not a rented car and Pallatroni either lied or made an inexcusable error, the Court should have remanded to Judge Duffy, who very likely would have had a different view of Pallatroni's credibility. Instead, the Court concluded that

Pallatroni's "mistake" was insignificant, for in the Court's view, a dealer car, which the Pontiac was and which Pallatroni knew it was, is equally suspicious because it too helps obscure the driver's identity. What the Court overlooked, however, is Pallatroni's admission that he had never heard of a dealer's car being used in a narcotics transaction (B.227). Furthermore, the suggestion that a dealer car could conceal Papa's identity and was therefore equally suggestive of a narcotics transaction (O.2129) (an assertion that no one testified to) falls only slightly shy of absurdity. Every one of the officers knew Papa on sight, and the dealer's car could easily be traced to him in any event.

The Court's treatment of another of Pallatroni's false claims is equally alarming. Pallatroni claimed to have concluded that attorney Richman's car was being used as a decoy, to "take the heat off" a major narcotics transaction. The Court found this "plausible" (O.2130) even though the claim was predicated upon Pallatroni's testimony that he was unable to learn the ownership of the car, testimony proven to be false in the hearing before Judge Brieant. Ignoring the perjurious predicate for the "decoy" story, the Court opines that it makes no difference that the officers knew the car was an attorney's car; "Attorneys, unlike Calpurnia, are not necessarily always above suspicion, even in narcotics cases" (O.2130). But is it reasonable to conclude from evidence that an attorney is

present at a meeting and then leaves, that a major narcotics transaction is then in progress and the attorney is a participant in it? Was there the slightest suggestion of an empirical basis for such an inference? Could there have been? If paranoia about attorneys permits them prima facie to be considered co-conspirators with suspected narcotics dealers in whose company they are seen, then attorney Richman could have been arrested and his briefcase searched too. The reductio ad absurdum to which appellant DiNapoli alluded in his brief (p. 15) has arrived.

The thrust of the Court's opinion in justifying Pallatroni's arrest, search and seizure under the Fourth Amendment found probable cause because of the belief that 1908 Bronxdale Avenue was a suspicious address linked to narcotics traffic (0.2125); Vincent Papa was a well-known narcotics violator (0.2126); the use by Papa of an alleged leased or rental car was significant in that it was an effort to avoid detection (0.2128); attorney Richmond's car drove in a circular route thus creating in Pallatroni the belief that its task was to take heat off the surveillance (0.2130); and a light suitcase went into 1908 Bronxdale Avenue believed carried by Papa and a heavier suitcase came out (0.2131).

Detective Spurdis and Patrolman Reilly went to 1908 Bronxdale Avenue, Bronx, New York, on February 3rd, 1972, to execute a "John Doe" narcotics arrest warrant only after going to several other places. It was very much like a last resort. 1908 Bronxdale was

not a narcotics haven and it had never been associated with narcotics activities. At most the Court's opinion relies on the facts that because one Facchiano, believed involved in narcotics but not even named as a conspirator in this case, was observed outside the Cottage Inn in conversation with someone seated in a car registered to a person at 1908 Bronxdale and that four months prior to the arrest, search and seizure a Joseph DiBenedetto, an owner of the Cottage Inn, was arrested exiting 1908 Bronxdale Avenue for Grand Larceny automobile. 1908 Bronxdale was suspicious.*** The Government never even attempted to demonstrate that either Papa or DiNapoli knew Facchiano or were linked to him in any way.

The fact that Papa was known to Pallatroni as a narcotics violator is undisputed. Clearly this alone would be insufficient to justify a search of Papa, much less DiNapoli. The communication from other arresting officers received by Pallatroni who was not at the scene was that Papa was carrying a suitcase into 1908 Bronxdale, a residence in which the officers knew Papa did not reside. Pallatroni felt suspicious that Papa known to reside in Queens was at 1908 Bronxdale. He was a figure unfamiliar to the area according to Pallatroni. It was Papa that was the target and the subject

*** Joseph DiBenedetto testified in behalf of DiNapoli and indicated that he was a former tenant at 1908 Bronxdale before the DiNapoli's moved in. That moreover he was a money collector for DiNapoli and was jointly indicted with him for shylocking in the United States District Court for the Eastern District of New York.

of Pallatroni's attention. The agents misinformed their Group Supervisor Pallatroni for it was DiNapoli, not Papa, going into his own home with a seemingly light suitcase in his hand. The Court called attention to the extensive surveillances at the Cottage Inn and 1908 Bronxdale Avenue and yet none of the law enforcement officers involved knew or even could recognize the principal resident of 1908 Bronxdale, Joseph DiNapoli. While reasonable error committed by the officers in assessing whether to effect an arrest and search can amount to probable cause given specific information the absence of reliable information cannot elevate absolutely erroneous or non-existent information within one of the exceptions to the Fourth Amendment. Pallatroni was erroneously told by his own men that it was Papa carrying a suitcase into an address unusual to him. Pallatroni acted on this information. The officers on scene admitted at the hearing their mistake although they perpetuated it in their intelligence reports. The Court nevertheless found reasonable Pallatroni's reliance on the misinformation given to him by his own officers. The truth was that it was DiNapoli at his own residence with his own suitcase -- a very usual and common sight anywhere in the world.

The car driven by Papa was neither leased nor rented. Pallatroni was carried away with Papa's unexpected presence at the scene and at best confused as to the fact that Papa was driving a car

with dealer's plates. Having received wrong information from his surveillance team as to Papa carrying the suitcase, he now claimed that he received wrong information from communications to the effect that Papa was now driving a rented car. The fact was that Papa was driving a Pontiac with dealer's plates because his own automobile was undergoing repairs.

Now acting upon a well of mis-information provided by police officers which in the Court's opinion was worthy of elevation to a Fourth Amendment exception, Pallatroni decided to participate personally in the surveillance at 1908 Bronxdale Avenue. Attorney Richmond left 1908 Bronxdale at night and in the heavy rain. He had the misfortune of making a wrong turn. Pallatroni promptly claimed that this created the impression that attorney Richmond's objective was to take the heat-off the surveillance. The Government never contended other than an honest mistake both by Richmond as to his own driving and Pallatroni as to the conclusion drawn. The Court, nevertheless, found still another element of reasonableness in this comedy of errors thus avoiding the sanction of the Fourth Amendment.

Pallatroni claimed to have made the decision to stop the Pontiac and arrest the occupants DiNapoli and Papa. He did so not on what he had seen but on what officers under him erroneously observed. Had Pallatroni been correctly advised that DiNapoli was

going into his own house with a suitcase and left thereafter with a heavier one, even in the company of Papa, that attorney Richmond made a wrong turn by mistake and knew nothing of a surveillance, and that Papa was not in a rented or leased car, it seems reasonable that Pallatroni would not have made the decision to hit the car. One's own observations may lead to erroneous interpretations but here police officers through mis-information attempt to elevate a fact situation which is figment to probable cause.

(a) Relevancy.

The fact that only a photograph of the almost million dollars was shown to the jury instead of the actual money detracts little if anything from its impact at trial. A sigh of disbelief emanated from the jury when the Government alluded to the seizure for the first time in its opening statement. The overflow of prejudicial effect balanced against its probative value made it impossible for DiNapoli to receive a fair trial and furthermore obliged him to submit into the record a felony conviction based upon extortion and shylocking to the jury without even testifying in an effort to explain and mitigate the prejudicial imbalance of the money. Moreover, the receipt of the money cloaked DiNapoli with assorted professional criminality not germane to

the issues of the case.

The point is well-made by the Court that "the \$960,000 could also be taken to be at least in substantial part narcotics proceeds" (0.2142; emp. added). But the jury had no business speculating on such a matter. Despite defense requests, the trial court made no effort whatsoever to limit testimony about the amount of money seized from DiNapoli to an amount consistent with the issue raised by the indictment. At the then going rate of \$21,000 per kilo an amount well-under \$100,000 was at the very minimum appropriate. The District Court denied all applications to minimize the prejudicial impact of the seizure and reduce it to an amount consistent with the proof. In Williams v. United States, 168 U.S. 382 (1897) a conviction was reversed on similar grounds. Furthermore, there was neither proof nor claim by the Government of a sudden acquisition of wealth. By reducing the amount as requested by the defense, it would not have been necessary for DiNapoli to have informed the jury that he was a convicted felon, and the prejudicial impact of the testimony would have been within tolerable bounds.

POINT IISUFFICIENCY OF THE EVIDENCE.

Although we must accept the view of the evidence most favorable to the Government for purposes of appeal, it is also true that as a matter of law it was incumbent upon the prosecution to demonstrate at trial that DiNapoli's participation in the Conspiracy was established within the guidelines of United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969); United States v. D'Amato, 493 F.2d 362 (2nd Cir. 1974). The Court held that Pugliese's delivery of \$8,000 or \$10,000 to DiNapoli for an unspecified purpose was proof of DiNapoli's membership in the conspiracy, even though Pannirello did not know by hearing or otherwise if DiNapoli was engaged in narcotics activity. The money was paid precisely at a period when DiNapoli was involved in loan sharking according to the Government. The fact that DiNapoli failed to count the money in Pugliese's presence does not prove that Pugliese was an underling, delivering to his boss, since even in such a relationship a count would be appropriate. Moreover, it wholly fails to show a narcotics relationship.

The Court points out that a narcotics relationship need not have been drawn by the jury but could have been (O.2142). The quantum of legal proof necessary to establish DiNapoli's participation in the conspiracy was not met by inferences from

neutral facts, but an actual showing by the Government that DiNapoli's knowingly knew of the objectives of the narcotics conspiracy and willingly joined it. The fact that DiNapoli was at one time arrested with \$967,450, does not raise the level of the proof to anything other than speculation. Pannirello's assertion that he never witnessed a narcotics transaction in his presence involving DiNapoli places the delivery of \$8,000 or \$10,000 in its proper prospective. These statements in conjunction with the Pannirello assertion "DiLacio picked up the kilo from DiNapoli" was within the realm of hearsay and therefore within the standing hearsay objection and the motion to strike preserved at trial. Only a reading out of context permits the conclusion that Pannirello's assertion could be taken "as fact found by the jury" (0.2144).

The direct proof absent hearsay adduced against DiNapoli pales by comparison with that offered against Alonzo in this case. Although Pannirello could not testify against DiNapoli as either having dealt in or being observed in any narcotics activity, he did testify to a direct sale of drugs to Alonzo, who had admitted being a dealer previously, in order to permit him to "get rolling again". Whereas the Court's opinion called attention to the fact that Pugliese associated with DiNapoli "at 1908 Bronxdale and at the Beach Rose Social Club", confirming the likelihood of the

established business relationship, the Court viewed Alonzo's presence at an apartment when Pannirello made a delivery of drugs to Hansen as innocuous, indicating that presence alone was not enough. United States v. Torrell, 474 F.2d 872 (2nd Cir. 1973) (0.2150). Alonzo thus received the benefit, and rightfully so, of the single transaction line of cases. Interestingly, Alonzo, who was linked by direct proof to narcotics activity by Pannirello's dealings with him escapes his conviction, while DiNapoli's twenty year sentence is affirmed on what Pannirello allegedly heard from others.

POINT III

A SINGLE CONSPIRACY.

The Court's opinion rejecting appellant's multiple conspiracy argument leads to the conclusion that because Macy's and Gimbels buy and sell the same Westinghouse products they are not really competitors but engaged in a common, joint business venture (0.2136-2141). Thus, Kotteakos v. United States, 328 U.S. 750 (1946) is emasculated.

The record at trial clearly established that even if DiNapoli was engaged in narcotics traffic, he was at a minimum a business competitor of Inglese. The Court points primarily to Barnaba and Mamone as the links that established that the "DiNapoli" and "Inglese" operations were a single venture (0.2136-7). The Court

adds moreover, that Pugliese had knowledge of intimate details regarding the Inglese operation (0.2137-8), and that the two organizations were linked by sales to common distributors (0.2138).

John Barnaba was an independent contractor. He attempted purchases from Lessa, bought heroin from Inglese and Pugliese. He worked for no one but himself. The evidence established that he was not paid by either Inglese or Pugliese (much less by DiNapoli); that he purchased heroin at negotiated prices. At one time or another his business was solicited from Lessa, Pugliese, and Inglese, the latter asking that he deal exclusively with him to the exclusion of the others. Inglese required Barnaba to pay in advance but Pugliese was willing to trust Barnaba, and furnished him with heroin on consignment. While the Court assumed that this "may be taken as evidence of mutual trust and cooperation between the operations and indicative of the link between them", it proves the exact opposite. It strains logic not to see that there was no joint sales policy between the two operations and that each vied for the other's customers. The fact that Inglese (Tramunti) mistrusted Barnaba and warned him not to purchase drugs from anyone and Pugliese (DiNapoli) extended credit, establishes no concert or agreement as to policy between the operations. Barnaba was not obligated to guarantee any quantity of purchases, nor required to have his customers either known or approved. He did not know

Papa, the so-called common source of supply to both groups, from whom he purchased drugs through Lessa, nor did he attempt to identify DiNapoli in the Courtroom, nor claim he knew him. Under the Court's reasoning, had Barnaba also purchased drugs from say Jack Spada, this would have meant that the Sperling operation was likewise a part of the present conspiracy. United States v. Sperling, No. 73-2363 (2nd Cir. Oct. 10th, 1974). The fact that Barnaba purchased drugs from Inglese and later from Pugliese is not proof that Inglese and Pugliese were partners in an unlawful agreement to violate the Federal Narcotics Laws, but simply establishes that Barnaba knew both individuals and dealt with each at arm's length.

The Court noted (0.2114 N.12) that Mamone was DiNapoli's partner and singled him out as decisive of the link between the two organizations. Mamone vouched for Barnaba's customer Forbrick to Inglese, in the sense that he could be trusted, since Inglese did not want to meet him personally. Such a recommendation meant not that Inglese (Tramunti) was Mamone's (DiNapoli) partner, but at most that Mamone was friendly with Inglese and trusted him. At most Mamone was a casual facilitator who is entitled to the treatment of United States v. Hyschlon, 448 F.2d 672 (2nd Cir. 1959). The assistance Mamone rendered Inglese in November, 1970, at the Beach Rose Club in helping him count money received from

Barnaba as advance payment from Forbrick for narcotics (0.2137) was at best innocuous. Mamone was not told the money was for drugs. It did not result in Inglese giving Mamone any money or an order to supply narcotics. At best it was Mamone helping Inglese count undesignated money owing to Inglese for drugs to be supplied by Inglese. We do not question that the evidence in this respect points to the fact that Inglese and Mamone are friendly and that Inglese trusted Mamone in his "okay" of Forbrick and in counting the latter's money as an accommodation. The fact is that Barnaba was at the time Inglese's customer, and Inglese would not trust him in his recommendation of Forbrick nor in the accuracy of the count of money advanced by Forbrick through Barnaba to Inglese. Finally, Mamone's offer of assistance to Barnaba regarding a dispute with one of his customers, Burke, depicts Mamone at best as a gratuitous interloper, since Mamone did not participate in Barnaba's transaction with Burke nor in any of the representations made nor the resulting disbursements. Furthermore, there was no set-off of any kind. Mamone was not offering to refund money nor to replace the narcotics. He was in effect offering to speak with Burke not to harm Barnaba. Mamone's activities on the trial record called by the Court as "somewhat shadowy" (0.2144) amounted to vouching, counting and offering to intercede to avoid personal violence to Barnaba.

CONCLUSION

Petitioner DiNapoli respectfully moves that he be granted a rehearing en banc pursuant to Rules 35 and 40, of the Rules of Appellate Procedure, together with such other and further relief as may be just and proper in the premises.

Respectfully submitted,

s/ Steven B. Duke

s/ Frank A. Lopez
Attorneys for Appellant
DiNapoli

CERTIFICATE

We, STEVEN B. DUKE and FRANK A. LOPEZ, do hereby certify that this petition is made in good faith and not for the purpose of delay, and in our judgment, upon sufficient grounds.

Dated: March 28th, 1975.

s/ Steven B. Duke

s/ Frank A. Lopez

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

- against -

JOSEPH DiNAPOLI,

Appellant.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF New York

ss.:

I, Eugene L. St. Louis

being duly sworn,

depose and say that deponent is not a party to the action, is over 18 years of age and resides at

1235 Plane St., Union, N.J. 07083

That on the 31st day of March 1975, deponent served the annexed

Petition for Rehearing

upon See attached sheet

attorney(s) for

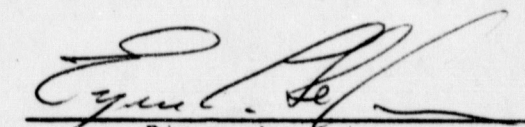
in this action, at See attached Sheet

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 31st

day of March

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Print name beneath signature
Eugene L. St. Louis

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NO. 31 - 0410950
QUALIFIED IN NEW YORK COUNTY
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